UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WILLIAM E. PINKHAM,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 97-84-B***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Social Security Disability ("SSD") appeal requires the court to decide whether the Commissioner properly determined that the plaintiff — whose disabling heart problems remained undiagnosed until 1992 — was not disabled in 1987, when he was insured under the SSD program. Agreeing with the plaintiff that the Social Security Administration failed to follow its own procedure for making such a determination, I recommend that the decision of the Commissioner be vacated.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs*., 690 F.2d 5, 6 (1st Cir. 1982), the

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[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Commissioner of Social Security Kenneth S. Apfel is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. § 405(g). The Commissioner had admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 7, 1997 pursuant to Local Rule 16.3(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

Administrative Law Judge found that the plaintiff had not engaged in substantial gainful activity since 1986; Finding 2, Record p. 16; that his disability insured status expired on December 31, 1987; Finding 1, Record p. 16; and that, as of the expiration of his insured status, he did not have a severe impairment and was therefore not disabled, Findings 4-5; Record p. 16. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff suffers from congestive heart failure, chronic obstructive pulmonary disease and post-polio restrictive pulmonary disease; the Administrative Law Judge determined that, as of 1992, the plaintiff was disabled by virtue of his impairments meeting Listing 3.02 (chronic pulmonary insufficiency) in Appendix 1 to Subpart B, 20 C.F.R. § 404. Record p. 14. He was hospitalized in December 1992; prior to that date, he had not seen a doctor in 30 years. *Id* at 15. The Administrative Law Judge specifically found the plaintiff's testimony concerning his impairments and their impact on his ability to work to be credible. Finding 3, Record p. 16. She also heard testimony from a medical advisor, Donald Magioncalda, M.D. Asked his opinion of the plaintiff's condition in 1987, Magioncalda testified that "all three of [the plaintiff's] conditions would be

chronic and progressive. And although he may not have been listing level [in 1987], he certainly would have had some significant impairments even seven years before he presented in [heart] failure," i.e., in 1992. Record pp. 35-36. He added only that it would be "pretty hard" to estimate the plaintiff's residual functional capacity for work, and it is apparent from the context that he was referring to the plaintiff's capacity in 1987. *Id*. at 36.

The plaintiff contends that the Administrative Law Judge's decision is at variance with Social Security Ruling 83-20, reprinted in *West's Social Security Reporting Service* (1992) at 49-58, which governs determinations of disability onset.[3] I must agree.

Ruling 83-20 instructs that

> [i]n disabilities of nontraumatic origin, the determination of onset involves consideration of the applicant's allegations, work history, if any, and the medical and other evidence concerning impairment severity. The weight to be given any of the relevant evidence depends on the individual case.

Id. at 50. The date alleged by the claimant should be used "if it is consistent with all the evidence available." *Id*. at 51. "[T]he established onset date must be fixed based on the facts and can never be inconsistent with the medical evidence of record." *Id.*

According to Ruling 83-20, "it may be possible," but only "in some cases," for the Administrative Law Judge to use the medical evidence of record "to reasonably infer that the onset of a disabling impairment(s) occurred some time prior to the date of the first recorded medical examination." *Id*. Such a determination "must have a legitimate medical basis" and, as the Administrative Law Judge did here, it is necessary to call on the services of a medical advisor in such circumstances. *Id.*

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[3] Social Security Rulings "are binding on all components of the Social Security Administration." 20 C.F.R. § 402.35(b)(1).

Ruling 83-20 also contemplates the possibility that the available medical evidence will not yield a reasonable inference about the progression of a claimant's impairment. *Id*. In such a case, "it may be necessary to explore other sources of documentation" such as information from family members, friends and former employers of the claimant. *Id*. "The impact of lay evidence on the decision of onset will be limited to the degree it is not contrary to the medical evidence of record." *Id.* at 52.

The Administrative Law Judge departed from this regime. She noted a lack of "objective medical evidence" antedating 1992. Record p. 15. She recast the medical advisor's comment about the difficulty of a retrospective assessment concerning residual functional capacity, attributing to him a view that it was "not possible" to draw such an inference. *Id*. Most significantly, she concluded that "the lack of objective medical evidence to establish the presence and severity of the claimant's medical conditions as of the date last insured directs a finding of not disabled." *Id*., citing 20 C.F.R. §§ 404.1525-30.[4] This is at variance with Ruling 83-20, which clearly contemplates cases in which the Commissioner will adopt a claimant's asserted disability onset date even absent objective medical data to support it, as long as the claimant's contention is not *contradicted* by the medical record. This may be such a case, and accordingly the determination that the plaintiff was not

[4] The cited regulations concern the Listings, their role in the decisionmaking process, the evaluation of medical opinion generally, the evaluation of symptoms and other medical data, and the requirement that claimants follow the treatment prescribed by their physicians. They do not address the issue of disability onset or the process of inferring such a date.

At oral argument, the Commissioner reprised the theme first sounded by the Administrative Law Judge, suggesting that there is no basis for considering the plaintiff's asserted disability onset date because there is no medical evidence sufficient even to trigger the inference-drawing process. Even assuming this is a correct interpretation of Ruling 83-20, the record belies such a contention. As noted, *supra*, the medical advisor unambiguously opined that the plaintiff suffered from at least some impairment as early as 1985.

disabled as of his date last insured is not supported by substantial evidence in the record.[5]

For the foregoing reasons, I recommend that the decision of the Commissioner be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of November, 1997.

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David M. Cohen
United States Magistrate Judge

[5] The Administrative Law Judge made certain additional findings, apparently at step five of the sequential evaluation process, perhaps in anticipation of the possibility that her findings at step two would be deemed inadequate. At oral argument, the Commissioner asked the court to disregard these determinations and decide the case based purely on the step two issue. Accordingly, I do not discuss the additional findings.